UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of:

MIKE-SELL'S POTATO CHIP CO.

and Case No. 09-CA-184215

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES AND SERVICE, AND CASINO EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957

RESPONDENT'S EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ANDREW S. GOLLIN

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB"), Respondent Mike-sell's Potato Chip Co. ("Respondent") hereby files Exceptions to the Decision and Recommended Order ("Decision") of Administrative Law Judge Andrew S. Gollin ("ALJ"), which issued in the above-captioned case on July 25, 2017. *See* JD–55–17. The specific grounds for these Exceptions are detailed in the contemporaneously-filed Respondent's Brief in Support of Exceptions to the Decision of Administrative Law Judge Andrew S. Gollin. Respondent excepts to the ALJ's Decision as follows:

1. **Decision p. 2, lines 2-4:** The finding/conclusion that "the decision to sell the four sales routes amounted to subcontracting of unit work, which is a mandatory subject of bargaining."

2. **Decision p. 2, line 4:** The finding/conclusion that "the Union did not waive its right to bargain."

3. **Decision p. 2, lines 4-6:** The finding/conclusion that "the requested information was both relevant and necessary to the Union for its role as bargaining representative."

4. **Decision p. 2, lines 28-30:** The finding/conclusion that, "[a]t the hearing, all parties were afforded the right to . . . present any relevant documentary evidence . . . ."

5. **Decision p. 5, lines 8-10:** The finding/conclusion that "[r]outes sales drivers are paid a commission . . . as well as additional benefits . . . per the collective-bargaining agreement."

6. **Decision p. 5, lines 14-16:** The finding/conclusion that "[i]ndependent distributors are individuals or entities that enter into agreements with Respondent for the primary right to distribute Respondent's products within a defined geographic territory."

7. **Decision p. 5, lines 16-17:** The finding/conclusion that "[i]ndependent distributors perform the same core tasks as route sales drivers as far as servicing the customers . . . ."

8. **Decision p. 5, lines 23-24:** The finding/conclusion that "[t]he specific terms of the arrangement between Respondent and distributors are set forth in the independent distributor agreements."

9. **Decision p. 5, footnote 7:** The finding/conclusion that "[i]f there is any dispute as to the territory boundaries, the final decision is made by Respondent as to which distributor is to service the territory in question, without recourse from the distributors involved."

10. **Decision p. 6, lines 28-29:** The finding/conclusion that Respondent sold the Marion, Ohio, sales route "because . . . it continued to lose approximately $1,100 per week."

11. **Decision p. 6, lines 35-36:** The finding/conclusion that Respondent argued that sale of the Marion, Ohio, route was "a change in the Company's distribution methods to reallocate risk of unprofitable routes."

12. **Decision p. 6, line 36 through Decision p. 7, line 1:** The finding/conclusion that "Respondent argued it was permitted [to sell routes] under the management-rights clause (Article XIX) . . . ."

13. **Decision p. 7, lines 5-44:** The finding/conclusion that the "pertinent part" of Arbitrator Paolucci's Award is limited to the cited language of RX-2, pp. 20-21.

14. **Decision, p. 8, lines 29-30:** The finding/conclusion that "Respondent did not provide the Union notice that the routes had reverted back, or that they had been resold to Helms [sic] Distributing Company."

15. **Decision, p. 8, lines 36-38:** The finding/conclusion that ALJ Carter "found the parties were not at impasse at the time of the implementation through March 2013" and that "the Union continued to make conciliatory offers toward an agreement."

16. **Decision, p. 9, lines 24-25:** The finding/conclusion that "Respondent did not provide the Union notification that the routes had reverted back, or that they were being resold to Big TMT Enterprize."

17. **Decision, p. 9, footnote 14, sentence 2:** The finding/conclusion that "Respondent failed to present sufficient evidence to establish the Union had actual or constructive notice" that the Greenville and Springfield routes were resold to Big TMT Enterprize.

18. **Decision, p. 10, lines 1-2:** The finding/conclusion that "[t]he parties met for bargaining" continuously "from October 2012 through June 2014."

19. **Decision, p. 10, lines 30-31:** The finding/conclusion that "Respondent sent all employees a letter informing them of its plan to sell Dayton sales routes to independent distributors . . . ."

20. **Decision, p. 10, lines 42-43:** The finding/conclusion that "Respondent stated it had the prerogative to sell the routes under the Paolucci decision."

21. **Decision, p. 10, lines 43-44:** The finding/conclusion that the "Union did not demand to bargain over the sale of the routes because no routes had been selected at that time."

22. **Decision, p. 11, lines 18-19:** The finding/conclusion that, "[o]n September 29, 2016, the Union . . . filed a grievance regarding the sale of these two routes [i.e., 104 and 122]." (Typographical error, citing the date of September 29th instead of August 29th.)

23. **Decision, p. 11, lines 44-45:** The finding/conclusion that, "[i]n order to be prepared for such bargaining, the Union requested the [requested] information[.]"

24. **Decision, p. 12, lines 44-45:** The finding/conclusion that "Respondent did not provide the Union with the information it requested."

25. **Decision, p. 14, lines 5-7:** The finding/conclusion that "because there was obligation to bargain over the sales, Respondent argues it had no obligation to provide the Union with the requested information." (Typographical error, omitting the word "no" before the first use of the word "obligation.")

26. **Decision, p. 14, lines 9-49 through Decision p. 26, lines 1-3:** The "Legal Analysis" Sections A through D, particularly (but not exclusively) to the extent they analogize this case to the following distinguishable cases (in order of appearance in ALJ Decision, and all as affirmed or enforced, if applicable): *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964); *Bob's Big Boy Family Restaurants,* 264 NLRB 1369 (1982); *Dubuque Packing Co.,* 303 NLRB 386 (1991); *Torrington Industries,* 307 NLRB 809

(1992); *OGS Technologies, Inc.*, 356 NLRB 642 (2011); *Mi Pueblo Foods,* 360 NLRB 1097 (2014); *UAW-DaimlerChrysler National Training Center,* 341 NLRB 431 (2004); *Pontiac Osteopathic Hospital,* 336 NLRB 1021 (2001); *Ciba-Geigy Pharmaceuticals Division,* 264 NLRB 1013 (1982); *Northwest Airport Inn,* 359 NLRB 690 (2013); *Sutter Health Central Valley Region,* 362 NLRB No. 199 slip. op. (2015); *Provena St. Joseph Medical Center,* 350 NLRB 808 (2007); *Mississippi Power Co.,* 332 NLRB 530 (2000); *Owens-Brockway Plastic Products,* 311 NLRB 519 (1993); *Buck Creek Coal,* 310 NLRB 1240 (1993); *Control Services,* 303 NLRB 481 (1991); *American Red Cross,* 364 NLRB No. 98 slip op. (2016); *Hospital San Cristobal,* 358 NLRB 769 (2012); *Ampersand Publishing, LLC,* 358 NLRB 1415 (2012); *Sociedad Espanola de Auilio Mutuo y Beneficiencia de P.R.,* 342 NLRB 458 (2004); *E.I. Du Pont De Nemours*, 364 NLRB No. 113 (2016); *Beverly Health & Rehab. Servs., Inc.,* 335 NLRB 635 (2001); *Register-Guard,* 339 NLRB 353 (2003); *Weavexx, LLC,* 364 NLRB No. 141, slip. op. (2016).

27. **Decision, p. 14, line 11:** The conclusory heading of "Legal Analysis" Section A that "Decisions to Sell the Routes Were Mandatory Subjects of Bargaining."

28. **Decision, p. 16, lines 30-32:** The finding/conclusion that, "[a]lthough *Dubuque* concerned work relocation decisions, the test is applicable to decisions that have a direct impact on employment, but, have as their focus the economic profitability of the employing enterprise."

29. **Decision, p. 17, lines 31-33:** The finding/conclusion that "the core question" is whether the scope and direction of Respondent's business was "substantially altered" by the sale of the four routes at issue.

30. **Decision, p. 17, lines 31-33:** The finding/conclusion that "the scope and direction of Respondent's business was [not] substantially altered when it sold the four company routes at issue to the independent distributors."

31. **Decision, p. 17, lines 38-39:** The finding/conclusion that, "[a]s for the four routes at issue, Respondent continues to distribute products to those customers."

32. **Decision, p. 17, lines 39-41:** The finding/conclusion that "[t]he only difference [in the four routes at issue] is that independent distributors are delivering the products on those routes rather than the company route sales drivers."

33. **Decision, p. 17, lines 43-45:** The finding/conclusion that Respondent "replac[ed] existing employees with those of an independent contractor to do the same work under similar conditions."

34. **Decision, p. 17, line 49 through Decision p. 18, line 1:** The finding/conclusion that "both groups [i.e., drivers and distributors] are responsible for delivering Respondent's products to its customers."

35. **Decision, p. 18, footnote 16:** The finding/conclusion that, "[u]nder the parties' agreement, route sales drivers are paid a flat rate for route riding and pull up (stocking) work," and are "[o]therwise . . . paid a commission."

36. **Decision, p. 18, lines 7-8:** The finding/conclusion that "the independent distributors perform the same core work under similar conditions as the route sales drivers."

37. **Decision, p. 18, lines 8-10:** The finding/conclusion "sales of these four company routes in 2016 are akin to subcontracting, and, therefore, are mandatory subjects of bargaining."

38. **Decision, p. 18, lines 12-14:** The finding/conclusion that "Respondent contends it has no obligation to bargain because while labor costs were a factor in deciding to sell the routes, it actually costs Respondent more to use independent distributors because of their margins."

39. **Decision, p. 18, lines 14-17:** The finding/conclusion that "because . . . there was no actual change in Respondent's operations, and labor costs played a role in Respondent's decision to sell the routes, Respondent had an obligation to bargain over the decision to sell the four routes at issue."

40. **Decision, p. 18, line 39:** The finding/conclusion that *West Virginia Baking Co.,* 299 NLRB 306 (1990) is "inapposite."

41. **Decision, p. 19, lines 4-6:** The finding/conclusion that, in *Adams Dairy,* 350 F.2d 108 (8th Cir. 1965), "the employer . . . had independent distributors take over the driver-salesmen routes, without giving the Union prior notice or an opportunity to bargain."

42. **Decision, p. 19, lines 6-7:** The finding/conclusion that the ALJ is "bound by Board law and cannot rely upon the reasoning of the Court of Appeals" in *Adams Dairy,* 350 F.2d 108 (8th Cir. 1965).

43. **Decision, p. 19, line 8:** The finding/conclusion that *Adams Dairy,* 350 F.2d 108 (8th Cir. 1965) is "inapposite."

44. **Decision, p. 18, lines 19-43 through Decision, p. 19, lines 1-12:** The finding/conclusion that *West Virginia Baking Co.,* 299 NLRB 306 (1990) and *Adams Dairy,* 350 F.2d 108 (8th Cir. 1965) are distinguishable because those cases involved the complete elimination of all in-house routes and the total conversion to distributorships, whereas Mike-sell's converted four routes to distributorships and retained 12 driver-run routes.

45. **Decision, p. 19, lines 14-15:** The conclusory heading of "Legal Analysis" Section B that "The Union Did Not Waive its Right to Bargain Over the Decision to Sell Routes 102 or 131 by Failing to Request Bargaining."

46. **Decision, p. 20, lines 4-6:** The finding/conclusion that, "[a]t the June 2016 third-step grievance meeting over the Union's May 2016 grievance, Respondent informed the Union that it had the right to make the sales under the Paolucci decision."

47. **Decision, p. 20, lines 9-10:** The finding/conclusion that Respondent's waiver argument is based solely on "the Union's failure to request bargaining over the sale of [Route 102]."

48. **Decision, p. 20, lines 14-15:** The finding/conclusion that "the combination of Respondent's April 27 and . . . July 11 letters amounted to a notice of a fait accompli."

49. **Decision, p. 20, lines 19-20:** The finding/conclusion that, "on July 11, Respondent notified the Union of its final decision to sell Route 102 . . . ."

50. **Decision, p. 20, lines 21-25:** The finding/conclusion that "[t]he only reasonable reading of these [April 27 and July 11] letters is that Respondent had no intention of bargaining . . . regarding the decision to sell these routes; only that it would be willing to bargain over the effects;" and that "[t]his conclusion is further supported by Respondent's September 12, 2016, response to the Union's August 31, 2016, request to bargain over the decisions to sell Routes 104 and 122, when Respondent stated that, per the Arbitration decision, it had no obligation to bargain . . . over the sale of these routes."

51. **Decision, p. 20, lines 27-28:** The finding/conclusion that "the Union's failure to request bargaining over the sale of Route 102 does not constitute a waiver of its right to bargain."

52. **Decision, p. 20, lines 30-31:** The finding/conclusion that "the Union did not waive its right to bargain over the sale of Route 131 by failing to make a request to bargain after receiving notice of that decision to sell."

53. **Decision, p. 20, lines 34-35:** The finding/conclusion that "Respondent announced the sale of Route 131 as a fait accompli because it had a fixed intent and was not willing to bargain over the decision."

54. **Decision, p. 20, lines 37-38:** The conclusory heading of "Legal Analysis" Section C that "The Union Did Not 'Clearly and Unmistakably' Waive Its Right to Bargain Over the 2016 Decision to Sell . . . the Four Company Routes."

55. **Decision, p. 20, lines 44-46:** The finding/conclusion that "waiver occurs when a union . . . cedes full discretion to the employer on such a matter."

56. **Decision, p. 21, lines 5-6:** The finding/conclusion that "a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time."

57. **Decision, p. 21, lines 11-13:** The finding/conclusion that the ALJ "addressed and rejected" Respondent's argument "that it had no obligation to bargain because it had an inherent right, separate from the expired agreement, to make these decisions to sell routes."

58. **Decision, p. 21, lines 13-15:** The finding/conclusion that "Respondent also indirectly relies upon the language of the parties' expired collective-bargaining agreement . . . as supporting its waiver argument."

59. **Decision, p. 21, footnote 17:** The finding/conclusion that, "in its communications with the Union announcing these sales, Respondent never cited to or relied upon the modified bidding language in its June 2013 revised final offer to support its unilateral action" and "instead, repeatedly relied solely upon Arbitrator Paolucci's decision—and the language that existed then—to support its action."

60. **Decision, p. 21, lines 17-19:** The finding/conclusion that "[Arbitrator Paolucci] concluded that the sale of the company route was permitted under the management-rights clause, which allowed Respondent the discretion to control distribution methods."

61. **Decision, p. 21, lines 19-21:** The finding/conclusion that "a waiver of bargaining rights under a management-rights clause does not survive the expiration of a contract."

62. **Decision, p. 21, lines 27-30:** The finding/conclusion that "[t]he contract language falls well short of [the 'clear and unmistakable waiver'] standard" and that it "makes no reference to the period beyond the contract's expiration, and fails to unequivocally and specifically express an intention to permit the Respondent to continue implementing unilateral changes of this sort after contract expiration."

63. **Decision, p. 21, lines 35-39:** The finding/conclusion that "[t]o establish a past practice of subcontracting justifying a refusal to bargain, an employer must show that the previous subcontracting was similar in kind and degree and occurred with such regularity and frequency that employees could reasonably expect the practice to continue or recur on a regular and consistent basis."

64. **Decision, p. 21, lines 39-40:** The finding/conclusion that "[a] history of subcontracting on a random, intermittent, or discretionary basis is insufficient."

65. **Decision, p. 22, lines 44-47:** The finding/conclusion that "Respondent cannot rely upon its prior, unilateral decisions to sell company routes to independent distributors, both before and after the expiration of the parties' agreement, as establishing a waiver of the Union's right to request bargaining over the sale of the four company routes at issue."

66. **Decision, p. 22, lines 47-49 through Decision, p. 23, lines 1-2:** The finding/conclusion that "[a]s established in all the letters Respondent sent to the Union announcing its intent to sell the routes, as well as its response to the Union's August 2016 demand to bargain, Respondent relied upon Arbitrator Paolucci's decision, which found Respondent had the right to sell company routes based on the language of the now expired management-rights clause."

67. **Decision, p. 23, footnote 18:** The conclusion to "reject" the argument that "Arbitrator Paolucci recognized that Respondent had an 'inherent management right' to sell company routes" and to "find that Arbitrator Paolucci was relying upon this language as giving Respondent the right to sell the route in that case, and he was not concluding that there was some extra-contractual right."

68. **Decision, p. 23, lines 10-11:** The conclusion to reject Arbitrator Paolucci's "interpretation or reasoning" with regard to Article VIII-B – Section 5 of the Expired Contract.

69. **Decision, p. 23, lines 14-16:** The finding/conclusion that, "when Respondent sells a route to an independent distributor, it is not eliminated—it continues to exist" and "merely is being serviced by an independent distributor, as opposed to a unit driver."

70. **Decision, p. 23, footnote 19:** The finding/conclusion that Phil Kazer's cited testimony "suggests that Respondent retains certain control and authority over routes that are sold to independent distributors to ensure that the routes are being properly handled."

71. **Decision, p. 23, lines 26-27:** The finding/conclusion that "there is no provision, other than the management-rights clause, that arguably gives Respondent the authority to subcontract work by selling routes."

72. **Decision, p. 23, lines 27-30:** The finding/conclusion that, "[a]bsent some other contractual provision waiving the Union's right to bargain over the subcontracting of unit work through the sale of the route to an independent distributor, the default, or the status quo, is the statutory obligation to bargain over those decisions."

73. **Decision, p. 24, lines 3-7:** The finding/conclusion that, "prior changes, made with no cognizable fixed criteria, do not establish a past practice that [Respondent] was permitted to continue post-contract expiration, even if earlier changes also occurred during contract hiatuses pursuant to the expired management rights provision."

74. **Decision, p. 24, lines 7-10:** The finding/conclusion that "there were no set criteria used to decide which routes to sell" and that "Kazer testified the decisions to sell were based on . . . whether Respondent believed that [the distributors] could handle the routes."

75. **Decision, p. 24, footnote 20:** The finding/conclusion that the ALJ "need not address [the reason for the Union's failure to bargain over past routes sales] because . . . Respondent has failed to establish a clear and unmistakable waiver."

76. **Decision, p. 24, lines 12-15:** The finding/conclusion that "Respondent's waiver arguments, whether based on the management-rights clause in the expired contract, the arbitration decision which relied upon the management-rights clause, or the past practice that developed pursuant to the management-rights clause or arbitration decision, all fail under current Board precedent."

77. **Decision, p. 24, lines 16-17:** The finding/conclusion that "Respondent had a statutory obligation to bargain with the Union over the decision to sell the four routes at issue, and its failure to do so violates Section 8(a)(5) and (1) of the Act."

78. **Decision, p. 24, lines 19-20:** The conclusory heading of "Legal Analysis" Section D that "Respondent Had an Obligation to Provide the Union with the Information Requested on August 31, 2016."

79. **Decision, p. 25, lines 37-39:** The finding/conclusion that the Union's August 31 letter requested certain information "in order [to] facilitate bargaining, particularly in light of Respondent's reliance on the past arbitration decision which largely hinged on route profitability . . . ."

80. **Decision, p. 25, lines 48-49 through Decision, p. 26, line 1:** The finding/conclusion that, "[b]ased on the wording of the [August 31] letter, and the context in which it was sent, . . . the Union demonstrated the relevance of the information request, or that the relevance of the information should have been apparent under the circumstances."

81. **Decision, p. 26, line 1:** The finding/conclusion that "Respondent's failure to provide the requested information violates Section 8(a)(5) and (1) of the Act."

82. **Decision, p. 27, lines 30-39:** The ALJ's "Conclusions of Law," paragraphs 4-6.

83. **Decision, p. 27, line 45 through Decision p. 28, line 23:** The entirety of the ALJ's "Remedy," including but not limited to Respondent's affirmative requirements to "rescind the sales of Routes 102, 104, 122, and 131;" "bargain with the Union regarding the decision to subcontract or sell company sales routes;" "make any employees whole, with interest, for any loss of earnings resulting from Respondent's unilateral subcontracting of bargaining unit work associated with the sale of Routes 102, 104, 122, and 131;" "compensate employees for any adverse tax consequences for receiving lump-sum backpay awards by payment to each employee of the amount of excess tax liability owed;" "provide the Union with the information

requested in its August 31, 2016, information request;" and "post an appropriate informational notice . . . at the Respondent's Dayton facility . . . for 60 days."

84. **Decision, p. 28, line 25 through Decision p. 30, line 7:** The entirety of the ALJ's "Recommended Order," including but not limited to the cease-and-desist provisions in Paragraphs 1(a) – 1(d) and the affirmative action provisions in Paragraphs 2(a) – 2(f).

85. **Decision, at Appendix A:** The entirety of the proposed "Notice to Employees," including but not limited to the Notice provisions associated with the ALJ's "Remedy" and "Recommended Order" that are specifically referenced in Exceptions 83 and 84 above, as well as the Notice's additional affirmative requirement to "assign [Routes 102, 104, 122, and 131] to unit employees."

86. **Decision, in general:** The ALJ's failure to recognize the lack of discriminatory aim or other improper motive for the Company's sale of routes, as evidenced by the fact that the Union voluntarily withdrew its 8(a)(3) charge allegation.

87. **Decision, in general:** The ALJ's failure to recognize that, despite a collective bargaining relationship, and regardless of the existence of a labor contract, employers retain certain inherent rights to manage their businesses, unless and until such rights are expressly bargained away.

88. **Decision, in general:** The ALJ's failure to address or make findings as to whether the Union had the ability to offer meaningful concessions in view of Respondent's objectives in selling the routes at issue.

89. **Decision, in general:** The ALJ's failure to recognize the vast differences between the hiring process for drivers and the purchasing process for distributors.

90. **Decision, in general:** The ALJ's failure to recognize the vast differences in the business relationship and extent of control that Respondent maintains with drivers versus distributors.

91. **Decision, in general:** The ALJ's failure to recognize the significant discretion that distributors enjoy with regard to the sales territory they purchase.

92. **Decision, in general:** The ALJ's failure to recognize the vast differences between the rights and responsibilities of drivers versus distributors.

93. **Decision, in general:** The ALJ's failure to recognize that the relationships between Respondent and its distributors develop and evolve over time, sometimes in ways contrary to the contractual language of the Independent Distributor Agreements.

94. **Decision, in general:** The ALJ's failure to recognize the relative magnitude of change in Respondent's operations, as well as the relative magnitude of Respondent's asset liquidation and capital investment, in relation to the sale of routes in 2016.

95. **Decision, in general:** The ALJ's failure to recognize that the unilateral sale of routes in 2016 was not "a material, substantial, and significant change" to drivers' terms and conditions of employment.

96. **Decision, in general:** The ALJ's failure to address the fact that the sale of the four routes in 2016 enabled Respondent to shift its risk of loss, liquidate certain assets, obtain a credit line increase, and reallocate recouped capital to major manufacturing improvements that would not otherwise have been possible.

97. **Decision, in general:** The ALJ's ruling to sustain the General Counsel's and Charging Party's objection to, and to exclude from evidence at hearing, a multi-year profit-and-loss summary for the four routes sold in 2016, which was specifically requested by the NLRB during investigation of Second Amended Charge No. No. 09-CA-184215. (Tr. 410-19.)

Dated: September 26, 2017

Respectfully submitted,

Jennifer R. Asbrock
jasbrock@fbtlaw.com
FROST BROWN TODD LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363
Telephone: (502) 589-5400
Facsimile: (502) 581-1087

Counsel for Respondent Mike-sell's Potato Chip Co.

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2017, the foregoing was served via electronic filing through the National Labor Relations Board website (www.nlrb.gov) to the National Labor Relations Board's Office of the Executive Secretary, located at 1015 Half Street SE, Washington, DC 20570-0001, with additional service copies sent as follows:

Garey E. Lindsay, Regional Director
Linda Finch, Counsel for the General Counsel
National Labor Relations Board Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
(*via email at Linda.Finch@nlrb.gov*)

John R. Doll, Counsel for Charging Party
c/o Doll, Jansen, & Ford
111 W. First St., Suite 1100
Dayton, Ohio 45402-1156
(*via email at jdoll@djflawfirm.com*)

Office of the General Counsel
c/o National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001
(*via U.S. mail*)

Jennifer R. Asbrock
Counsel for Respondent Mike-sell's Potato Chip Co.

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